

A **Superintendent of Lands and Surveys (4th Div) & Anor
v Hamit bin Matusin & Ors**

B SUPREME COURT (KUCHING) — CIVIL APPEAL NO 01-19-91
PEH SWEE CHIN, WAN YAHYA SCJJ AND CHARLES HO J
21 JULY 1994

C *Civil Procedure — Pleadings — Defence not pleaded — Not objected to until final submissions — Whether material facts which ought to be pleaded — Whether waived or inferentially consented to — Whether defence a radical departure from pleadings and should therefore be disregarded — Rules of the High Court 1980 O 18 r 7(1)*

D The plaintiffs applied for an injunction, inter alia, to restrain the defendants from building on certain state lands ('the lands'), over which the plaintiffs claimed to have acquired native customary rights. At the trial, one of the reasons for the defendants' denial of the existence of such native customary rights was that the lands were situated within a river bank reserve on which no one could claim any title thereon by virtue of the Sarawak Land Code (Cap 81). Another reason was that the lands once belonged to Sarawak Shell Oil Ltd. In the final submission after the conclusion of all the evidence, an objection was raised by the plaintiffs for the first time that such defences were not pleaded and ought to be disregarded under O 18 r 7(1) of the Rules of the High Court 1980.

E The trial judge held that the non-compliance under O 18 was not merely technical, and such alleged defences would be totally disregarded. The defendants have appealed.

F **Held**, allowing the appeal and ordering a retrial:

- G (1) The underlying well-known rationale for requiring material facts to be pleaded is to prevent the opposing party from being taken by surprise by evidence which departs from pleaded material facts. However, when evidence represented a departure from the pleadings, it should be objected to when and where it was adduced, and it would be too late when it was only objected to later on, as in the final submission at the close of evidence in the instant appeal. Otherwise, in the event of such an objection being accepted by the court, the party adducing such evidence may face the risk of being denied leave to amend his pleadings at that stage.
- H (2) Moreover, in the instant appeal, evidence bearing on the two alleged defences was not such a radical departure but a mere development of what had been alleged by the defendants. Therefore, although the two alleged defences were material facts which ought to be pleaded, such a non-radical departure was waived or inferentially consented to when the evidence was adduced without objection by the plaintiffs.
- I

Per curiam:

In civil cases, both parties can validate any mode of adducing evidence by consent, express or inferred, even when such mode is irregular, for any irregularity is deemed to be waived by such consent. Even technical rules of evidence can to a limited extent, be dispensed with by a court without such consent.

[Bahasa Malaysia summary]

Plaintif telah memohon suatu injunksi untuk, antara lain, menghalang defendan daripada membina atas beberapa bidang tanah kerajaan tertentu ('tanah itu'), atas mana plaintif mengatakan bahawa mereka telah memperolehi hak adat anak watan. Pada perbicaraan, satu sebab mengapa defendan menafikan kewujudan hak adat anak watan adalah kerana tanah itu terletak pada suatu simpanan tebing sungai atas mana seseorang tidak boleh menuntut sebarang hakmilik diatasnya disebabkan oleh Kanun Tanah Sarawak (Bab 81). Satu lagi sebab adalah kerana tanah itu pada suatu masa dahulu dipunyai oleh Sarawak Shell Oil Ltd. Di dalam penghujahan terakhir selepas tamatnya pengemukaan kesemua keterangan, suatu bantahan telah dibangkitkan oleh plaintif untuk kali pertama bahawa alasan sedemikian tidak dibuat pli dan sepatutnya diketepikan di bawah A 18 k 7(1) Kaedah-Kaedah Mahkamah Tinggi 1980.

Hakim perbicaraan telah memutuskan bahawa ketidakpatuhan di bawah A 18 bukanlah hanya dari segi teknikal, dan alasan yang dikatakan itu tidak akan diendahkan. Defendan telah membuat rayuan.

Diputuskan, membenarkan rayuan itu dan memerintahkan supaya suatu perbicaraan baru diadakan:

- (1) Rasional mendasari yang diketahui umum yang menghendaki supaya fakta yang penting dijadikan pli adalah untuk menghalang pihak pembangkang daripada dikejutkan oleh keterangan yang menyimpang daripada fakta penting yang telah dibuat pli. Akan tetapi, apabila keterangan menyimpang daripada pliding, bantahan sepatutnya dibuat apabila dan di mana ianya dikemukakan, dan adalah terlampau lewat apabila bantahan dibuat selepas itu, sebagaimana yang berlaku di dalam penghujahan terakhir selepas tamatnya pengemukaan kesemua keterangan di dalam rayuan ini. Jikalau tidak, jika bantahan sedemikian diterima oleh mahkamah, pihak yang mengemukakan keterangan sedemikian akan menghadapi risiko bahawa beliau tidak dibenarkan untuk meminda plidingnya pada peringkat itu.
- (2) Lebih-lebih lagi, di dalam rayuan ini, keterangan yang berkaitan dengan kedua-dua alasan itu tidak merupakan penyimpangan yang begitu radikal tetapi hanya merupakan perlanjutan perkara yang telah dikatakan oleh defendan. Oleh itu, walaupun kedua-dua alasan yang dikatakan itu merupakan fakta yang penting,

- A penyimpangan tidak radikal itu telah diketepikan atau telah dipersetujui secara inferens apabila keterangan itu dikemukakan tanpa sebarang bantahan daripada plaintif.

Per curiam:

- B Di dalam kes sivil, kedua-dua pihak boleh mengesahkan sebarang cara untuk mengemukakan keterangan melalui persetujuan, secara nyata atau secara inferens, walaupun cara sedemikian adalah di luar aturan, kerana sebarang luar aturan disifatkan sebagai telah diketepikan melalui persetujuan sedemikian. Keterangan mahkamah yang teknikal juga boleh, pada takat yang terhad, diketepikan oleh mahkamah tanpa persetujuan sedemikian.]
- C

Notes

For cases on departure from pleadings, see 2 *Mallal's Digest* (4th Ed) paras 1724–1726; [1992] *Mallal's Digest* 322.

D

Cases referred to

Ang Koon Kau & Anor v Lau Piang Ngong [1984] 2 MLJ 277 (refd)
Baerlein v Chartered Mercantile Bank [1895] 2 Ch 488 (refd)
Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)
John G Stein & Co Ltd v O'Hanlon [1965] AC 890; [1965] 1 All ER 547; [1965] 2 WLR 496 (refd)
Siti Aisha bte Ibrahim v Goh Cheng Hwai [1982] 2 MLJ 124 (refd)
Waghorn v George Wimpey & Co Ltd [1970] 1 All ER 474; [1969] 1 WLR 1764 (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152 (refd)

F

Legislation referred to

Sarawak Land Code (Cap 81)
Rules of the High Court 1980 O 18 r 7(1)

- G **Appeal from:** Civil Suit Nos MR 49, 50, 52, 57, 61 of 1983 and MR 76 of 1988 (High Court, Miri)

Abdul Halim bin Hj Sabil (Pejabat Peguam Negeri Sarawak) for the appellants.

MS Sandhu (*MS Sandhu & Co*) for the respondents.

H

Cur Adv Vult

Peh Swee Chin SCJ (delivering the judgment of the court): A small point of practice and procedure relating to evidence at variance with or departing from pleading arises in this appeal and though there is no dearth of authorities on it, application of the relevant principles seems to have frequently given rise to some difficulty as in this appeal; further, we feel we ought to give our reasons for differing from an otherwise well-reasoned judgment of the learned trial judge.

I

For reasons which will become apparent later, only a very brief summary of the facts in this case will be given. A

The seven respondents (hereafter 'the plaintiffs'), have all claimed to have acquired native customary rights in certain alleged state lands at Kampong Dagang, Miri, Sarawak, by virtue of the Sarawak Land Code (Cap 81). Because of the entry of the appellants upon their respective lands and the demolition of their houses thereon by the appellants, they now claim an injunction to restrain the appellants from building on the respective lands and damages, etc. B

Both appellants (hereafter 'the defendants'), in each of their respective defence, deny the allegation that the plaintiffs have acquired such native customary rights but admit their entry of their respective lands alleged to have been acquired by native customary rights and the demolition of the houses thereon. C

It will have been noticed that there is a denial by the defendants of such alleged native customary rights without further particulars as to any reason for such mere denial. D

At the trial, one of the reasons for their denial of such allegations of native customary rights (apart from their requiring strict proof of such rights), by virtue of certain sections in the Sarawak Land Code (Cap 81), was that the said lands were situated within a river bank reserve on which no one could claim any title thereon by virtue of the Sarawak Land Code (Cap 81). Yet another reason was that the said lands had allegedly belonged to Sarawak Shell Oil Ltd at one time. E

It was only in the final submission after the conclusion of all the evidence that an objection was raised by the plaintiffs, for the first time, that such defences were not pleaded. Learned counsel for the plaintiffs argued before the learned trial judge in his final submission that such defences were not pleaded and such evidence ought to be disregarded for 'the defendants sought to establish facts which would provide them with a complete defence in law'. To this, the learned trial judge agreed, holding that the defendants were in breach of O 18 r 7(1) of the Rules of the High Court 1980 which are set out as follows: F

7(1) Subject to the provisions of this rule and rules 10, 11 and 12, every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits. G

8(1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality — H

- (a) which he alleges makes any claim or defence of the opposite party not maintainable; or
- (b) which, if not specifically pleaded, might take the opposite party by surprise; or
- (c) which raises issues of fact not arising out of the preceding pleading. I

- A The learned trial judge by way of emphasis, underlined r 8(1)(b) above. His Lordship relied on *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 and *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 and held that the non-compliance under O 18 was not merely technical, and such alleged defences (and it goes without saying that evidence adduced thereon), would be totally disregarded.

- B What is important to bear in mind is that evidence bearing on these two defences was not objected to at all as regards their inadmissibility on account of its departure from the defence of the defendants as and when such evidence emerged or was adduced. It emerged as early as during the cross-examination of PW1 (and there were nine witnesses called for the plaintiffs), and in fact the first question in such cross-examination that was asked of PW1 was about the distance of his house from the river bank.

By O 18 r 7(1), a pleading must contain only a statement, in summary form, of material facts but not the evidence by which these facts are to be proved.

- D Are these two alleged defences material facts which ought to be pleaded? We think they are, and on this, we agree with the learned trial judge.

- E A legal result or conclusion of law on facts proved before a court is generally not pleaded but only material facts which would lead to such a result or conclusion. When it comes to a defendant, eg it is not for him to say that he is not liable, eg for a sum claimed, he must also plead when available, eg that the goods were never delivered, or that he had been mistaken for another buyer with a similar name, etc. To merely say that he is not liable for the sum claimed is a legal result which should not, strictly speaking, have been pleaded but only stated in the prayers to the defence,
- F in the form that the claim be dismissed, though it is a normally acceptable and harmless harbinger of some material facts to follow by way of defence.

- G In the instant case, the defendants merely pleaded a denial of the acquisition of native customary rights claimed by the plaintiffs. This is not enough. They would have to say why; failure to do so would make any evidence of the reason for the denial objectionable at the option of the plaintiffs.

- H The underlying well-known rationale for requiring such material facts to be pleaded is, of course, to prevent the opposing party from being taken by surprise by evidence which departs from pleaded material facts, for such evidence, if allowed, will prejudice and embarrass or mislead the opposing party.

- I If a party is taken by surprise, he must object then and there at the point of time when such evidence emerges, for such evidence to be disregarded by the court, and the court will then uphold such timely objection. The court will generally, however, grant an adjournment if requested, on suitable terms as to costs, etc, for the pleading to be amended by the party seeking to adduce such evidence. One must bear in mind the need for an orderly adversary system of a court trial, not a chaotic harangue in a market place.

A party is not taken by surprise when the circumstances actually indicate so, eg when such evidence is the very evidence sought to be relied on by him from the outset, or when he fails to object to such evidence then and there as this court now seeks to emphasize.

Thus, when a plaintiff had stated in her pleadings that she was 'lawfully walking along the proper side of the road', when in evidence, she said she was crossing the road when no vehicles were in sight, it was held by the Federal Court that that was not fatal to her claim when the defendant was not taken by surprise because the fact of her walking across the road was pleaded by the defendant in the defence and relied on at the very outset. Please see *Siti Aisha bte Ibrahim v Goh Cheng Hwai* [1982] 2 MLJ 124.

We next deal with the fact that such evidence was not objected to timeously as being inadmissible on account of its being at variance with the pleadings.

Generally, in civil cases only, both parties can validate any mode of adducing evidence by consent, express or inferred, even when such mode is irregular, for any irregularity is deemed to be waived by such consent. Technical rules of evidence can be to a limited extent, even dispensed with by a court without such consent, please see *Baerlein v Chartered Mercantile Bank* [1895] 2 Ch 488; similarly with technical rules of procedure. Therefore, when such evidence represents a departure from pleadings, it should be objected to as when and where it is adduced, and it will be too late when it only objected to later on, as in the final submission at the close of evidence in the instant appeal. In these circumstances, the party facing such evidence at variance from the pleadings, by failing to object, cannot be said to be taken by surprise, prejudiced, misled or embarrassed. Otherwise, the other side of the coin would be, in the event of such an objection raised at the stage of final submission being accepted by the court, that the party adducing such evidence may face the great risk of being denied leave to amend his pleadings in question at that stage.

Such evidence, when given without any objection by the opposing party, will further have the effect of curing the absence of such plea in the relevant pleading, in other words, the effect of overcoming such defect in such pleading. As was stated by the Federal Court in *Ang Koon Kau & Anor v Lau Piang Ngong* [1984] 2 MLJ 277 at p 278: 'Evidence given at the trial can therefore in appropriate circumstances overcome defects in the pleadings where the net result of such evidence is to prevent the other side from being taken by surprise'. There is, however, at least one important exception to such curing of defect of pleading by evidence departing from such pleading without objection then and there to such evidence.

The exception is when such evidence represents a radical departure from the pleadings, and is not just a variation, modification or development of what has been alleged in the pleading in question, please see *Waghorn v George Wimpey & Co Ltd* [1970] 1 All ER 474; [1969] 1 WLR 1764, which gave rise to the proposition, which was approved by *Ang Koon Kau*

- A & *Anor v Lau Piang Ngong, and John G Stein & Co Ltd v O'Hanlon* [1965] AC 890; [1965] 1 All ER 547; [1965] 2 WLR 496.

B Therefore, a court inevitably ought to enquire, when there is failure to object to such evidence when it is adduced, whether it is such a radical departure, if not, it is a mere variation, modification or a development, then the impropriety of admission of such evidence at variance with the pleadings is deemed to be waived and the defect in such pleadings cured.

C In the instant appeal, evidence bearing on the two alleged defences is not such a radical departure but a mere development of what had been alleged by the defendants. Such a non-radical departure was waived or inferentially consented to when the evidence was adduced without objection by the plaintiffs.

Not having been taken by surprise by the evidence in question is not only indicated by the failure to object to such evidence as and when it was adduced. It is in any event, actually indicated also by the following circumstances in this case.

D The generalized defence in question must have appeared to the plaintiffs to be equivocal, but through some correspondence between the parties, they must have been aware of the nature of the defence. If they were really in doubt, they could have resorted to asking for further and better particulars under O 8 r 12 of the Rules of the High Court 1980. The fact that they chose to proceed with the hearing without taking such initiative shows they were in no way prejudiced or surprised by the more specific evidence raised by the defendants at the hearing.

F With the learned trial judge declining to consider at all, the evidence bearing on the two alleged defences, we are deprived of an opportunity of considering, on appeal here, the learned trial judge's conclusion and the reasons therefor on such alleged defences which would have been available to us had the evidence on such alleged defences not been excluded by the lower court as such alleged defences being by no means shadowy ones, a retrial would therefore be necessary. If we order costs against the plaintiffs in this connection, such costs may probably financially disable the plaintiffs from proceeding with the retrial, they, not being people of substance; therefore an appropriate order would have to be made.

H We, therefore, allow the appeal, setting aside the judgment of the lower court. We further order a retrial of all the consolidated cases concerned herein in this appeal before another judge and that an early date of hearing be fixed. The plaintiffs are to pay costs here and below but the payment of all such costs be deferred until the conclusion of the retrial, and any final appeal therefrom, if any.

Appeal allowed.